No. 15-1391

RECORD AND BRIEFS

Supreme Court, U.S.

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IN THE

Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, *et al.*,

Petitioners,

v.

ERIC T. SCHNEIDERMAN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ERIC T. SCHNEIDERMAN

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QUESTION PRESENTED

Whether a New York law that prohibits sellers from charging consumers additional fees above the regular, posted price when they use a credit card implicates the First Amendment.

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STATEMENT

The New York statute at issue in this case, General Business Law § 518, prohibits sellers from levying a surcharge on consumers who purchase goods or services using a credit card instead of cash.[1] Sellers are permitted, however, to provide discounts to cash users. (CA2 J.A. 109.) Petitioners—five New York businesses (and their owners) that want to charge consumers more for using credit cards (CA2 J.A. 56-61, 65)—claim that New York's surcharge prohibition violates the First Amendment and is unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment. (CA2 J.A. 74-75.)

1. New York's surcharge prohibition is modeled on a federal statute that was enacted in 1976 but that lapsed in 1984. Like New York's law, the federal statute prohibited credit-card surcharges while permitting cash discounts. Pub. L. No. 94-222, § 3(c), 90 Stat. 197, 197 (1976). The statute thus provided that "[n]o seller in any sales transaction may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash," *id.*, with "surcharge" defined as "any means of increasing the regular price to a cardholder which is not imposed" on a cash user, *id.* § 3(a), 90 Stat. at 197. By contrast, the statute permitted sellers to offer a "discount" for consumers who used cash, with "discount" defined as "a reduction made from the regular price." *Id.* To

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[1] The term "cash" is used herein to refer to payment through means other than a credit card, including cash, debit, or check.

further clarify the difference between surcharges and discounts in relation to a seller's regular price, Congress later enacted an amendment defining the term "regular price" as: (1) the posted price, if a seller posts only one price; or (2) the credit-card price, if a seller either does not post any price or posts prices for both credit and cash purchases. Cash Discount Act, Pub. L. No. 97-25, § 102(a), 95 Stat. 144, 144 (1981).

Congress enacted this federal prohibition because of its view that credit-card surcharges caused consumer and economic harms that mere cash discounts did not. Specifically, the federal prohibition was intended to prevent sellers from using surcharges to extract windfall profits; to avoid consumer confusion and unhappiness caused by the imposition of extra charges above the posted price; and to stop fraudulent and deceptive sales tactics by sellers who could lure consumers with a lower sticker price but then surprise them with a credit-card surcharge at the point of sale. *See The Fair Credit Billing Act Amendments of 1975, Hearing Before the Subcommittee on Consumer Affairs of the Committee on Banking, Currency & Housing*, 94th Cong. 24, at 5-8 (1975) (Kathleen F. O'Reilly, Legislative Director, Consumer Federation of America); *see also id.* at 19-22 (John Sheehan, Legislative Director, United Steelworkers of America).

2. The federal surcharge prohibition expired in 1984. At that time, New York (along with several other States) made the policy choice to prohibit

credit-card surcharges themselves.[2] New York's surcharge prohibition largely mirrors the wording of the federal statute, providing that "[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash." N.Y. Gen. Bus. Law § 518. Violations of New York's surcharge prohibition are punishable as misdemeanors. *Id.* The New York Attorney General is also authorized to bring civil enforcement actions to prevent or stop violations of the statute. *Id.* § 513; N.Y. Exec. Law § 63(12).

Although New York's statute does not incorporate the federal statute's definitions or expressly permit cash discounts, the Legislature made clear that New York's statute should be construed identically to the prior federal law. (*See* CA2 J.A. 109, 112.) And both legislators and consumer groups made equally clear that New York's law was motivated by the same underlying policy rationales as the lapsed federal surcharge prohibition: preventing unfair profiteering, consumer anger, and deceptive sales tactics. (*See* CA2 J.A. 109, 111-112, 114.)

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[2] In addition to New York, nine other States and Puerto Rico prohibit credit-card surcharges. *See* Cal. Civ. Code § 1748.1(a); Colo. Rev. Stat. § 5-2-212; Conn. Gen. Stat. § 42-133ff; Fla. Stat. § 501.0117; Kan. Stat. Ann. § 16a-2-403; Me. Rev. Stat. tit. 9-A, § 8-509; Mass. Gen. Laws ch. 140D, § 28A; Okla. Stat. tit. 14A, § 2-211; P.R. Laws Ann. tit. 10, § 11; Tex. Fin. Code Ann. § 339.001. Five of these States also prohibit sellers from collecting surcharges from consumers who use debit cards. *See* Conn. Gen. Stat. § 42-133ff; Kan. Stat. Ann. § 16a-2-403; Me. Rev. Stat. tit. 9-A, § 8-509; Okla. Stat. tit. 14A, § 2-211; Tex. Bus. & Comm. Code Ann. § 604A.002.

3. Until recently, the state no-surcharge laws were "effectively redundant" because private contractual agreements between sellers and credit-card companies already prohibited sellers from extracting surcharges for credit-card use. (CA2 J.A. 63 (Complaint).) In 2013, the credit-card companies agreed to temporarily lift these contractual surcharge prohibitions as part of a class-action settlement with sellers to resolve federal antitrust claims. *See In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, – F.3d –, 2016 WL 3563719, at *2-*3 (2d Cir. June 30, 2016). But a little more than a month ago, the Second Circuit reversed the settlement and vacated the class certification. *Id.* at *1, *12. The Second Circuit's decision has left unclear the current effect of the contractual surcharge prohibitions and the lasting practical import of state no-surcharge laws.

4. In 2013, petitioners filed this lawsuit against the New York Attorney General and three district attorneys, challenging the constitutionality of New York's credit-card surcharge law. (CA2 J.A. 6, 74-75.) The U.S. District Court for the Southern District of New York (Rakoff, J.) issued a preliminary injunction prohibiting the defendants from enforcing New York's surcharge law against petitioners (Pet. App. 85a), on the ground that the law violated the First and Fourteenth Amendments (Pet. App. 79a-80a).[3]

The parties stipulated to a court-ordered final judgment, with defendants reserving their right to

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[3] Petitioners also asserted an antitrust claim (CA2 J.A. 75), but that claim is not at issue here.

appeal. (Pet. App. 48a-54a.) In that judgment, the district court declared New York's surcharge law unconstitutional and issued a permanent injunction.[4] (Pet. App. 51a, 54a.)

5. The U.S. Court of Appeals for the Second Circuit vacated the judgment and remanded for dismissal of the complaint. (Pet. App. 3a.) The court construed petitioners' claims as challenging the application of New York's surcharge prohibition to "two distinct kinds of pricing schemes," and separately analyzed the constitutionality of each such prohibition. (*See* Pet. App. 13a-18a, 31a-37a.)

First, the court considered the pricing practice of collecting additional money in excess of a regular, posted "sticker price" when consumers use a credit card. (Pet. App. 14a-16a.) The court found that New York's statute plainly prohibited this pricing practice based on the "ordinary meaning" of the term "surcharge"—*i.e.*, levying an "additional amount above the seller's regular price" (Pet. App. 13a-14a).

The court also held that this prohibition is constitutional. As to petitioners' First Amendment claim, the court determined that the prohibition against adding credit-card fees above a seller's regular price is a direct price-control regulation that does not implicate the First Amendment. (Pet. App.

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[4] The final judgment also dismissed petitioners' antitrust claim without prejudice to petitioners renewing this claim if the final judgment were to be reversed. (Pet. App. 51a.) Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the court determined that there was no just reason to delay entry of final judgment on petitioners' First and Fourteenth Amendment claims. (Pet. App. 54a.)

18a-28a.) In so holding, the court rejected petitioners' theory that the surcharge prohibition restricted only the "words and labels" sellers use to describe equivalent price differentials between the prices they charge to credit users and cash users. (Pet. App. 20a (quoting district court opinion).) Rather, the court explained: "What Section 518 regulates—all that it regulates—is the difference between a seller's sticker price and the ultimate price that it charges to credit-card customers." (Pet. App. 21a-22a.) A seller remains free to characterize its price differentials "as whatever it wants," but such descriptions "would not change the fact" that adding credit-card fees to regular prices is prohibited while deducting amounts from regular prices for cash use is permitted. (Pet. App. 22a.) The court concluded that this regulation of economic conduct comported with the First Amendment. (Pet. App. 18a-19a.)

The court also rejected petitioners' vagueness challenge with respect to the statute's prohibition against run-of-the-mill surcharging schemes. Relying on the ordinary meaning of the term "surcharge," the court concluded that both "sellers 'of ordinary intelligence'" and New York enforcement authorities would "readily understand" that adding amounts above a seller's usual, posted prices for credit-card use violated the statute. (Pet. App. 42a.)

Second, the court considered whether New York's statute would also prohibit different pricing methods that do not involve "readily ascertainable" regular prices—such as "dual-price" schemes in which a seller posts both a credit price and a cash price without designating either as the "regular" price. (Pet. App. 15a.) Noting that the New York appellate courts had never interpreted the scope of New York's

surcharge prohibition (Pet. App. 32a), the court abstained from ruling on the constitutionality of New York's prohibition as applied to such pricing methods pursuant to *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). (Pet. App. 28a, 45a.) As the court explained, the statute was "readily susceptible to a construction under which" it did not prohibit pricing schemes that lacked regular prices (Pet. App. 18a (quotation marks omitted)) because it was "entirely possible, if not likely, that New York courts would interpret [New York's surcharge prohibition] as being identical to the lapsed federal ban" (Pet. App. 35a), which had expressly permitted such practices (Pet. App. 31a-32a).

REASONS FOR DENYING THE PETITION

The petition should be denied for two reasons. First, contrary to petitioners' claim, there is no direct split among the circuit courts on the question of law presented by this case. The Eleventh Circuit decision relied on by petitioners to assert a split struck down a statute that the court read as having a different meaning and applying to different pricing practices than the New York and Texas statutes that have been upheld by the Second and Fifth Circuits. Second, the decision below correctly held that a direct price regulation such as New York's surcharge prohibition does not implicate the First Amendment at all because it addresses conduct, rather than speech. Certiorari is accordingly not warranted.

A. The Decision Below Does Not Implicate Any Direct Circuit Conflict.

1. Petitioners assert (Pet. 16-18) that this Court should grant review because the Second Circuit's decision—along with a decision by the U.S. Court of Appeals for the Fifth Circuit, *Rowell v. Pettijohn*, 816 F.3d 73 (5th Cir. 2016), *petition for cert. filed*, No. 15-1455 (U.S. June 3, 2016)—conflicts with a decision by the Eleventh Circuit finding a Florida surcharge prohibition unconstitutional, *see Dana's R.R. Supply v. Att'y Gen. of Fla.*, 807 F.3d 1235 (11th Cir. 2015), *petition for cert. filed*, No. 15-1482 (U.S. June 8, 2016). But the different outcomes in these cases stem largely from the courts' different understandings of the scope and operation of the particular state statute at issue in each case. Although the wording of the central surcharge prohibition in each State's statute is similar, the courts' divergent views about the potential applications of the statutes to sellers' pricing practices led the Eleventh Circuit to focus on factual and legal issues that were different from the issues on which the Second and Fifth Circuits focused. As a result, these decisions do not create a direct circuit split.

As the Eleventh Circuit itself recognized, the "relevant statutory text and legislative history" of New York's statute "differ from" Florida's—distinctions that led the Second Circuit to reach a "narrow reading" of the scope of New York's law. *Dana's R.R.*, 807 F.3d at 1247 n.9. The Fifth Circuit's subsequent decision expressly followed the Second Circuit's lead in narrowly construing the scope of Texas's surcharge prohibition. *See Rowell*, 816 F.3d at 81. Specifically, the Second and Fifth Circuits interpreted their respective State's statutes as only

prohibiting sellers from imposing additional fees for credit-card use above a posted "single sticker price," and found that this prohibition did not implicate the First Amendment. (Pet. App. 2a, 13a-15a, 18a.) *Rowell*, 816 F.3d at 81.

Neither court held that these no-surcharge laws more broadly prohibited "dual-pricing"—*i.e.*, setting prices for both credit and cash purchases without designating a single sticker price as the easily ascertainable regular price—and thus neither court had occasion to address the constitutionality of such a prohibition. The Second Circuit held that there was too little state-court authority to reach a definitive conclusion about whether New York's law extended to "dual-pricing" absent single-sticker prices, and accordingly abstained from addressing the constitutional question posed by a prohibition on such pricing. (Pet. App. 28a-37a.) In the Fifth Circuit, the parties had conceded that such "dual pricing is allowed," *Rowell*, 816 F.3d at 83, and so that court likewise had no need to resolve the First Amendment implications of a dual-pricing prohibition.

By contrast, the Eleventh Circuit did not read Florida's statute to prohibit only the imposition of additional fees for credit-card use above a regular, posted price and thus, unlike the Second and Fifth Circuits, never squarely addressed the validity of such a "narrow" prohibition. *Dana's R.R.*, 807 F.3d at 1247 n.9. Instead, the Eleventh Circuit understood Florida's statute as applying broadly to all schemes setting "a lower price for customers paying cash and a higher price for those using credit cards"—regardless of whether the seller had posted a regular price—and on the basis of that more sweeping interpretation held that Florida's regulation of such

"dual-pricing" violated the First Amendment. *Id.* at 1239, 1245. This conclusion does not directly conflict with the Second or Fifth Circuit's rulings, since neither court addressed the constitutionality of a prohibition on "dual-pricing" in the absence of a single sticker price—the Second Circuit because it was uncertain whether New York law contained such a prohibition, and the Fifth Circuit because it held that Texas law did not contain such a prohibition.

Indeed, the Eleventh Circuit might have reached a different result if it had been convinced that the Florida statute applies only to surcharges imposed at the time of sale so as to raise the price above the posted sticker price, and not to an explicit dual-pricing scheme. As the dissenting judge in the Eleventh Circuit explained, the majority declined to give any independent meaning to distinct language in the Florida statute that limited its application to surcharges "imposed at the time of a sale"—language that would make the statute inapplicable to the situation where a merchant posts two different regular prices. The dissenter observed that this language supports a narrowing construction that would have obviated any "constitutional problem." *Id.* at 1251, 1253 (Carnes, J., dissenting); *see also id.* at 1252 (Carnes, J., dissenting) ("It is passing strange for a court to dismiss a legislature's definition of its own words as a strained reading of the legislature's own words."). The differing outcome in the Eleventh Circuit, as compared to the Second and Fifth Circuits, thus could have been avoided if the Eleventh Circuit had construed the language of Florida's statute more narrowly to "avoid or modify the necessity of reaching a federal constitutional question," *Kusper v. Pontikes*, 414 U.S. 51, 54 (1973).

The Eleventh Circuit has disagreed with the Second and Fifth Circuits on the meaning of similar language in the statutes of Florida, New York, and Texas—but that difference in construing the meaning of statutory language does not create a split on a *federal* question warranting this Court's review. In effect, despite similarities in statutory language, the Eleventh Circuit adopted an interpretation of Florida's surcharge prohibition that differed from the Second and Fifth Circuit's interpretations of New York's and Texas's laws, and these threshold interpretive differences resulted in distinct conclusions about the prohibitions' constitutional validity. This disagreement presents no square conflict on the application of the First Amendment.

2. An additional reason to deny certiorari is that further developments may clarify or eliminate any division among the circuits on the validity of state no-surcharge laws.

First, because the circuit courts' decisions here all relied on threshold (and contested) interpretations of state laws, further litigation in the state courts may alter the scope of the surcharge prohibitions at issue here. The "last word" on the meaning and scope of each State's surcharge prohibition belongs to that State's highest court rather than any federal court. *Pullman*, 312 U.S. at 499-500. But no State's highest court has yet interpreted a surcharge prohibition, and only one decision by an intermediate state appellate court has addressed such a law. *See Thrifty Oil Co. v. Superior Court*, 91 Cal. App. 4th 1070 (2001). Indeed, the Second Circuit declined to reach part of petitioners' constitutional claims specifically due to the "dearth of authority" from the New York courts (Pet. App. 32a).

The federal-court interpretations of state law on which each circuit court based its decision are thus necessarily "tentative" and could "be displaced tomorrow" by further state adjudications. *Pullman*, 312 U.S. at 500. If the state courts were to issue definitive interpretations of their State's respective surcharge prohibitions, the current differences among the circuit courts might dissipate entirely or ripen into a concrete split on First Amendment issues alone, without any underlying dispute over the proper reading of state law. This Court should not grant certiorari now to review the validity of state surcharge prohibitions in the absence of any meaningful resolution by the state courts of the interpretive disputes over these laws. *See Dana's R.R.*, 807 F.3d at 1251-53 (Carnes, J., dissenting).

Second, awaiting further adjudications would also provide this Court with concrete facts about sellers' actual pricing schemes and the application of state surcharge prohibitions to those schemes. As the Second Circuit noted, petitioners' constitutional claims here were largely based on hypotheticals, rather than "on the actual conduct in which they are engaged or would like to be engaged." (Pet. App. 18a.) The absence of actual experience with enforcement of state surcharge prohibitions is understandable in light of the fact that, until very recently, private contracts between sellers and credit-card companies independently prohibited such surcharges. (*See* Pet. App. 8a-9a; CA2 J.A. 63.) To the extent that the States now begin to enforce their surcharge prohibitions, litigation arising out of such disputes would provide this Court with a particularized understanding of how sellers set and post their prices and how the States will interpret and enforce their

surcharge prohibitions—factual issues that are critical to deciding petitioners' claims.[5]

Third, uncertainty surrounding the effects of the private antitrust settlement between sellers and credit-card companies counsels against granting review. As petitioners acknowledge, state surcharge prohibitions were "effectively redundant" of contractual surcharge prohibitions for many years. (CA2 J.A. 63.) But the state laws "assumed sudden importance" when a private antitrust settlement appeared to remove the contractual surcharge prohibitions. (Pet. 5.) The Second Circuit's recent decision invalidating that settlement has rendered the current status of the contractual surcharge prohibitions unclear and raised significant questions about the lasting practical import of state surcharge laws. See *supra* at 4. If the contractual no-surcharge rules were to be reinstated, the state surcharge prohibitions would again become largely duplicative—reducing any need for this Court's review. This Court should accordingly deny review until there is resolution of whether and for how long the credit-card companies' private agreements with sellers will include contractual surcharge prohibitions.

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[5] Petitioners claim that no further development is needed because there has been a single post-trial decision applying New York's surcharge prohibition and a handful of settlement agreements between the New York Attorney General and fuel sellers. (*See* Pet. 21.) But "[o]ne reported prosecution and one set of threatened prosecutions by the state's executive branch shed little light, if any, on how the New York Court of Appeals would construe" and apply the surcharge prohibition to particularized facts. (Pet. App. 37a.)

Fourth, because only three circuits have addressed state surcharge prohibitions, any potential conflict among the circuits is not fully developed and could wane without this Court's immediate intervention. The Ninth Circuit is currently considering a challenge to California's surcharge prohibition in a case that raises the same type of First and Fourteenth Amendment claims as petitioners asserted below. *See Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199 (E.D. Cal. 2015), *appeal pending* No. 15-15873 (9th Cir.), docketed Apr. 30, 2015. A decision in that pending appeal will likely provide this Court with further valuable analysis and information.

3. Certiorari should be denied for the additional reason that any division among the circuits on the constitutionality of different state surcharge prohibitions is not sufficiently important to warrant further review. Petitioners and their amici assert that interpretive harmony is needed so that sellers operating in multiple States can implement "uniform pricing schemes." (Pet. 20; *see* Br. for Amici Curiae Albertsons LLC, et al., at 13-14.) But States have long enacted a diverse range of price regulations that require merchants to adapt to the distinct regulatory schemes of every State. To give just a few examples, States have enacted different price floors or price ceilings in particular industries;[6] different minimum-

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[6] *See, e.g., Nebbia v. New York*, 291 U.S. 502, 515-20 (1934) (New York regulation of milk prices); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 609-11 (1937) (Virginia regulation of milk prices).

wage requirements that set distinct prices for labor;[7] different anti-usury laws that affect the price of loans;[8] and different discount policies that, for instance, prohibit sellers from using discounts to sell tobacco in some jurisdictions, while allowing such discounts in others.[9] Sellers that choose to do business in multiple States thus already routinely adjust their pricing to comply with each State's distinct pricing rules. Diverse state policies on credit-card surcharges would impose no greater burden on sellers than these and many other existing price regulations.

Moreover, few if any additional state laws are likely to be affected by any potential conflict among the courts of appeals that have addressed the validity of credit-card surcharge prohibitions. In the three circuits that have considered the validity of credit-card surcharge prohibitions, only one State (Connecticut) has a similar statute that has not yet been the subject of federal adjudication. Nor is any tension among the decisions of these three circuits likely to have much impact outside the context of credit-card surcharges. When the Eleventh Circuit struck down Florida's law, the court emphasized the "modest scope" of its decision and highlighted that its holding should not affect other economic regulations

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[7] *See* Nat'l Conference of State Legislators, *State Minimum Wages: 2016 Minimum Wage by State* (Revised July 19, 2016).

[8] *See* Am. Lawyers Q., *Usury Rate Summary* (Mar. 2010).

[9] *See Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71, 74-75 (1st Cir. 2013); *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of N.Y.*, 27 F. Supp. 3d 415, 418-19 (S.D.N.Y. 2014).

because it applied to a surcharge prohibition that the court viewed as unique. *Dana's R.R.*, 807 F.3d at 1251. Thus, there is no wide-ranging impact of these decisions that might warrant a grant of certiorari at this time.

B. The Decision Below Is Correct.

This Court's review is not warranted for the additional reason that the Second Circuit's decision is correct.

1. The Second Circuit correctly rejected petitioners' challenges to the New York statute's prohibition on levying additional credit-card fees above a seller's regular, posted price. States have exercised their police power to regulate prices "from time immemorial, and in this country from its first colonization." *See Munn v. Illinois*, 94 U.S. 113, 125 (1876). This Court has already held that such price-control laws do not implicate the First Amendment because they directly regulate what sellers may lawfully *do* when they set prices, rather than what they may *say* about otherwise lawful prices. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (plurality op.); *id.* at 530 (O'Connor, J., concurring in the judgment); *id.* at 524 (Thomas, J., concurring in part & concurring in the judgment); *see generally Munn*, 94 U.S. at 125 (grain warehousing prices); *Nebbia*, 291 U.S. at 537 (milk prices); *Yee v. City of Escondido*, 503 U.S. 519, 529-30 (1992) (rent prices). And the Second Circuit correctly recognized that this basic principle—that price-control laws regulate economic conduct rather than speech—applies not only when a State regulates final prices, but also when it regulates the relationships between prices. *See also, e.g., Nat'l Ass'n of Tobacco Outlets,*

731 F.3d at 76-78 (rejecting First Amendment challenge to ordinance prohibiting sellers from using discounts to reduce regular price of tobacco products).

New York's credit-card surcharge prohibition does nothing more than prevent sellers from the conduct of extracting charges above their regular, posted prices. Petitioners are simply wrong in arguing that this limitation on how sellers set and deviate from their regular prices affects protected speech by controlling how a seller "chooses to communicate price information to consumers" (Pet. 23). As petitioners conceded below (*see* Pet. App. 19a), price-control regulations have never been thought to implicate the First Amendment even though all prices are necessarily communicated through words or signs.

The Second Circuit thus correctly held that the "central flaw" in petitioners' argument was their "persistence in equating the actual imposition of a credit-card surcharge" or the provision of a cash discount "with the words that speakers of English" usually employ to describe those two distinct pricing practices—*i.e.*, the terms "surcharge" and "discount." (Pet. App. 21a.) The fact that sellers necessarily use words to convey their prices to customers does not mean that "surcharge" and "discount" are *nothing more* than words that describe otherwise identical price differences. Rather, common sense and everyday commercial practice demonstrate that surcharges and discounts are two distinct pricing practices distinguished by their relationship to a seller's regular price. See *supra* at 5-6. And both Congress and the New York Legislature made the rational policy determination that this well-understood difference between surcharges and

discounts is important because credit-card surcharges cause certain economic and consumer harms that cash discounts do not. See *supra* at 2-3. This policy choice to regulate prices does not implicate the First Amendment at all.

Petitioners are thus mistaken in relying on this Court's commercial speech cases. (*See* Pet. 22, 25.) Although States cannot seek to protect consumers by restricting sellers from conveying truthful information *about* lawful prices, *see, e.g., Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 766-70 (1976), they are free to regulate prices *directly* to shield or influence consumers and the economy, *see, e.g., 44 Liquormart*, 517 U.S. at 507 (plurality op.); *Nebbia*, 291 U.S. at 516-19, 537-38. Only the former type of regulation implicates speech; the latter affects only sellers' conduct of setting prices.

Finally, New York's surcharge prohibition is not unconstitutionally vague as applied to pricing schemes that collect credit-card fees in excess of a seller's regular, posted prices. All that due process requires is that ordinary people and law-enforcement officials can apply common sense to understand the core conduct that New York's statute prohibits. *See United States v. Williams*, 553 U.S. 285, 304 (2008). As the Second Circuit correctly concluded, this principle disposes of plaintiffs' vagueness claim because both everyday experience and common knowledge allow sellers and government enforcers to understand that adding amounts above a seller's regular, posted price is a prohibited surcharge, while deducting amounts from a seller's regular, posted price is a permissible discount.

2. To the extent that petitioners separately seek review of the Second Circuit's distinct holding to abstain from ruling on the constitutionality of New York's statute as applied to "dual-pricing" schemes, that holding also does not warrant certiorari.[10]

Pullman abstention safeguards against the "serious disruption by federal courts of state government [and] needless friction between state and federal authorities" that results when a federal court issues a premature and unnecessary ruling on a federal constitutional question based on a mistaken understanding of state law. *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959); *see Pullman*, 312 U.S. at 500-01. To avoid those hazards, courts can appropriately abstain when a state statute is readily susceptible to an interpretation that, if adopted by the state courts, would avoid or modify any federal constitutional claims at issue. *See Moore v. Sims*, 442 U.S. 415, 429 (1979).

This case presents the paradigmatic circumstances warranting abstention. Petitioners' constitutional claims are premised on their assumption that New York's surcharge prohibition applies more broadly than the prior federal surcharge ban—specifically, by prohibiting pricing practices (such as "dual-pricing") in which sellers do not have regular, posted prices. (*See* Pet. App. 32a; *see also* Pet. App. 28a-29a.) The Second Circuit correctly recognized that there was a

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[10] Petitioners' "Question Presented" does not separately seek certiorari to review the Second Circuit's abstention holding (*see* Pet. i), although the petition discusses that holding (*see* Pet. 28-30.) *See* Sup. Ct. R. 14 (providing that Court will not consider questions that are not set out as questions presented).

"dearth of authority" to support petitioners' characterization of New York law. (Pet. App. 32a.) Indeed, because New York's statute was modeled on the lapsed federal law, it is far more likely that the state appellate courts would interpret New York's surcharge prohibition as having the same scope as the federal statute, under which "dual-pricing" and similar practices were permissible. *See* Cash Discount Act, § 102(a), 95 Stat. at 144. In light of this readily available limiting construction and the absence of New York case law to the contrary, the Second Circuit appropriately declined to address petitioners' constitutional challenge pending further state-court developments.

Contrary to petitioners' assertions (Pet. 28-29), this Court has never pronounced any categorical rule barring courts from abstaining whenever a plaintiff asserts a First Amendment or vagueness challenge to a state statute. *See, e.g., Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 307-12 (1979) (lower court should have abstained on First Amendment and vagueness claims). The cases on which petitioners rely (Pet. 28-29) simply confirm that abstention is not automatic and instead requires that the state statute at issue be susceptible to a limiting construction.[11] That standard is satisfied here.

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[11] *See, e.g., City of Houston v. Hill*, 482 U.S. 451, 468 (1987) (ordinance "not susceptible" to limiting construction); *Procunier v. Martinez*, 416 U.S. 396, 403 (1974) (state interpretation "would not avoid or substantially modify" constitutional question); *Zwickler v. Koota*, 389 U.S. 241, 249 (1967) ("no question of a [statutory] construction . . . that would avoid or modify the constitutional question" (quotation marks omitted));

(*continues on next page*)

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In addition to the petition for a writ of certiorari filed in this case, petitions have also been filed in *Rowell* and *Dana's Railroad*. See *supra* at 8. These two petitions should be denied for substantially the same reasons as explained above. However, if the Court disagrees and is inclined to grant certiorari in one or more of these cases, we respectfully request that the Court grant the petition in this case to provide the New York Attorney General with the opportunity to defend New York's law.

Dombrowski v. Pfister, 380 U.S. 479, 491 (1965) ("no readily apparent" narrowing construction existed); *Baggett v. Bullitt*, 377 U.S. 360, 378 (1964) ("it is difficult to see how an abstract construction" of challenged statutory terms "could eliminate" vagueness).

CONCLUSION

The petition for a writ of certiorari should be denied.

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